



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Ensure lower taxes:** The bill is likely to increase the cost of workers' compensation insurance paid by employers of first responders, primarily cities and counties.

#### B. EFFECT OF PROPOSED CHANGES:

In 2003 Special Session A, the Legislature made numerous changes to chapter 440, F.S., governing workers' compensation.<sup>1</sup> On August 19, 2003, Speaker Byrd created the Homeland Security Workers' Compensation Workgroup to study workers' compensation issues affecting first responders such as firefighters, police officers and other emergency personnel. The workgroup's charge was to study workers' compensation problems and issues that particularly affect first responders, changes in current statutes that would alleviate those problems or address those issues, the fiscal impact of the recommended changes on the agencies that employ first responders, and the impact on public safety upon making or not making the recommended changes. The workgroup held three meetings to gather testimony from interested parties and stakeholders about workers' compensation issues affecting first responders. Oral testimony was heard at each meeting from interested parties, and written testimony was also received by the workgroup. A written report was issued on February 3, 2004 covering the testimony heard at the workgroup meetings and the issues raised by the stakeholders.

Based on the oral and written testimony received during the workgroup meetings from stakeholders, the workgroup identified nine primary areas of concern for first responders created by the 2003 changes to worker's compensation.

#### **Permanent Total Supplemental Benefits**

The first area of concern was the revision to s. 440.15(1)(f)1, F.S., which ends payment of permanent total disability (PTD) supplemental benefits (cost-of-living adjustments) at age 62 for workers unless the worker has not been able to work enough quarters to qualify for Social Security retirement due to the work-related injury. According to testimony received at each meeting, some local governments have opted out of the Social Security program. Thus, their first responders are not eligible for Social Security retirement. These same first responders would not be eligible for PTD supplemental benefits after age 62 either under the current law.

The bill amends current law to allow any injured first responder to receive PTD supplemental benefits for life if the injured first responder is employed by an employer who does not participate in the Social Security program.

#### **Standard of Proof for Occupational Disease and Exposure to Toxic Substances Claims**

Another area of concern involved the change made to the standard of proof for occupational disease, repetitive exposure, and exposure to toxic substances claims.<sup>2</sup> The standard of proof is the level of proof necessary for the injured worker/claimant to prevail.

Section 440.09(1), F.S., requires that an accidental compensable injury must be the major contributing cause of any resulting injury, meaning the cause must be more than 50 percent responsible for the injury as compared to all other causes combined, as demonstrated by medical evidence only. Under s. 440.02(1), F.S. an injury or disease caused by a toxic substance requires clear and convincing

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<sup>1</sup> Senate Bill 50A (chapter 2003-412, LOF)

<sup>2</sup> s. 440.02(1), F.S.; s. 440.09(1), F.S.

evidence establishing that exposure to the specific substance at the levels exposed to caused the injury or diseases sustained by the employee.

Section. 440.09, F.S. provides that in occupational disease cases both causation and sufficient exposure to a specific harmful substance known to be present in the workplace to support causation be proven by clear and convincing evidence. Currently, case law generally requires the claimant must prove a causal connection other than by merely showing that it is logical the injury arose out of the claimant's employment or that by a preponderance of the probabilities it appears that it arose out of such employment.

Courts have held that a higher standard of proof applies for occupational disease and exposure cases than other types of claims. Causation for exposure and occupational disease claims must be proven by clear evidence; a preponderance of the evidence is not enough. The District Court of Appeal noted:

In cases involving diseases or physical defects of an employee as distinguished from external occurrences to an employee such as an automobile accident, a claimant must prove a causal connection other than by merely showing that it is logical that the injury arose out of the claimant's employment or that by a preponderance of the probabilities it appears that it arose out of such employment. There must be some clear evidence rather than speculation or conjecture establishing the causal connection between the claimant's injury and her employment.<sup>3</sup>

The firefighters contended, in part, at the workgroup meetings a heightened burden of proof for first responders to prove exposure to toxic substances is unwarranted because the dangerousness of certain substances has already been determined. The State Fire Marshal's office has published a list of toxic substances (Florida Substance List) that are hazardous and has required employers to notify fire departments of the existence of the toxic substance in the workplace.<sup>4</sup> By promulgating the Florida Substance List, the firefighters contend the State Fire Marshal's office has recognized the hazardous nature of the materials contained on the List and that these materials pose a particular hazard to firefighters exposed to the substances fires in a workplace or in a house. Thus, the firefighters argue it is illogical to make them prove by clear and convincing evidence their exposure to substances on the Florida Substance List caused the work-related injury. This standard requires proving the worker's specific exposure to the substance was toxic, and the exposure to the substance has already been determined to be toxic by the State Fire Marshal.

The bill provides an injury or disease caused by the exposure to a toxic substance is not an injury by accident arising out of employment unless there is a preponderance of evidence establishing that exposure to the specific substance to which the first responder was exposed at the exposure levels can cause the injury or disease sustained by the employee. In effect, this lowers the standard of proof for first responders to prove an injury caused by exposure to toxic substances to a preponderance of the evidence. Thus, other workers will be held to a higher standard of proof (i.e. clear and convincing evidence).

In cases involving occupational diseases, both causation and sufficient exposure to a specific substance must be shown to be present in the workplace to support causation and must be proven by a preponderance of evidence. This change in the law would appear to lower the standard for causation to a preponderance of evidence for first responders. All other workers must prove occupational disease by the higher clear and convincing standard.

The bill also provides a definition of the term "occupational disease." The bill provides that such term means "only a disease that is due to causes and conditions that are characteristic of and peculiar to a particular trade, occupation, process, or employment, and excludes all ordinary diseases of life to which the general public is exposed, unless the incidence of the disease is substantially higher in the

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<sup>3</sup> Harris v. Joseph's of Greater Miami, 122 So.2d 561 (Fla. 1960).

<sup>4</sup> Rule 69A-62.004, F.A.C.

particular trade, occupation, process, or employment than for the general public." This definition is modeled after the definition provided in Chapter 440, F.S.

### **Attorney Fees**

The third area of concern for first responders identified in the testimony to the workgroup was the limit on attorney fees imposed by chapter 2003-412, LOF. The 2003 legislation continued the use of the existing contingency fee schedule in awarding attorney's fees and eliminating the authorization for hourly fees in most cases. The fee for benefits secured are limited to 20 percent of the first \$5,000 of benefits secured, 15 percent of the next \$5,000 of benefits secured, 10 percent of the remaining amount of benefits secured to be provided during the first 10 years after the claim is filed, and 5 percent of the benefits secured after 10 years. Except for cases involving medical-only claims, the legislation eliminated the discretionary hourly fees. As an alternative to the contingency fee for medical-only claims, the judge of compensation claims may approve an attorney's fee not to exceed \$1,500 once per accident, based on a maximum hourly rate of \$150 per hour, if the judge of compensation claims determines that the contingency fee schedule, based on benefits secured, fails to compensate fairly the attorney.

The bill does not address attorney's fees for first responder workers' compensation cases. Thus, attorneys representing first responders in workers' compensation cases will not be paid on an hourly basis. Rather, they will be paid in accordance with the contingency fee schedule unless the claim is medical-only and the \$1,500 attorney fee provision applies.

### **Psychiatric Injuries**

Three issues relating to medical benefits for psychiatric injuries were addressed by stakeholders in the workgroup meetings. The first issue was the creation of s. 440.093, F.S., in the 2003 revision, which precludes medical treatment for a psychiatric injury unless it is accompanied by a physical injury requiring medical treatment. The second issue was the 1-percent permanent impairment rating cap for psychiatric injuries imposed by s. 440.15(3) (c), F.S. Prior to the 2003 revision, there was no limit on the permanent impairment rating for a psychiatric injury. The third issue was the limit on payment of temporary indemnity benefits for psychiatric injuries to 6 months after maximum medical improvement (MMI) is obtained for the injured worker's physical injuries.<sup>5</sup>

Prior to the enactment of the 2003 reforms, a mental or nervous injury due to stress, fright, or excitement only, did not qualify as an accidental injury and was not compensable and the law also required that a mental or nervous injury occurring as a manifestation of a compensable injury must be demonstrated by clear and convincing evidence.<sup>6</sup> Florida case law determined that a mental or nervous injury, even with a physical injury or accident, was not compensable unless the physical injury was the causal factor.<sup>7</sup> The Florida Supreme Court stated:

For a mental or nervous injury to be compensable in Florida there must have been a physical injury. Otherwise, the disability would have been caused only by a mental stimulus, and must be denied coverage under the statutory exclusion. A mere touching cannot suffice as a physical injury.<sup>8</sup>

Subsequently, the Florida First District Court of Appeal held that eligibility for compensation for psychiatric injury resulting from compensable work-related physical injury required a finding by clear and convincing evidence that the mental or nervous injury was directly linked to the initial injury, not that the physical injury was the major contributing cause of the psychiatric injury.<sup>9</sup>

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<sup>5</sup> s. 440.093(3), F.S.

<sup>6</sup> s. 440.02(1), F.S.

<sup>7</sup> City of Holmes Beach v. Grace, 598 So.2d 71 (Fla. 1989).

<sup>8</sup> Id.

<sup>9</sup> Cromartie v. City of St. Petersburg, 840 So.2d 372 (Fla. 1<sup>st</sup> DCA 2003).

The 2003 legislation continued the mental nervous injury exclusions and the clear and convincing evidence standard noted above and codified case law that prohibited the payment of benefits for mental or nervous injuries without an accompanying physical injury; however, the law also provided that the physical injury must require medical treatment.<sup>10</sup> Before the 2003 legislative changes, case law provided that the lack of medical treatment was relevant to whether or not a sufficient injury had been sustained. The 2003 act required the compensable physical injury be the major contributing cause of the mental or nervous injury.<sup>11</sup> The act also provided that a physical injury resulted from a mental or nervous injury unaccompanied by a physical trauma requiring medical treatment is not compensable. It limited the duration of "temporary benefits" for a compensable mental or nervous injury to no more than six months after the employee reaches maximum medical improvement for the physical injury. In context, this six month limitation is understood to apply to the temporary disability benefits payable under s. 440.15, F.S., but not to medical benefits payable under s. 440.13, F.S. The act also placed a 1 percent limitation for permanent impairment benefits for psychiatric impairment. The permanent impairment benefit is based on the impairment rating schedule that provides the duration of the benefit is 3 weeks for each percent of impairment.

The bill does not address treatment for psychiatric injuries sustained by first responders. Thus, current law will apply to first responders sustaining psychiatric injuries as a result of a work related accident.

### **Independent Medical Examinations**

Testimony was received at the workgroup meetings about the limit of one independent medical examination (IME) per employee per accident imposed by chapter 2003-412, LOF. Concern was also raised about that requirement in chapter 2003-412, LOF that the employee pay for his or her IME. Prior to chapter 2003-412, LOF, the carriers paid for the injured worker's IMEs.

The bill does not address the IME issue for first responders. Thus, current law will govern IMEs by first responders and first responders will be limited to one IME per accident and will be required to pay for the IME.

### **Definition of First Responder**

Current law provides no definition of the term "first responder." The bill proposes a definition of the term. Under the proposed definition, a first responder is a law enforcement officer as defined in s. 943.10, F.S., a firefighter as defined in s. 633.30, F.S., an emergency medical technician or paramedic as defined in s. 401.23, F.S., and a volunteer firefighter engaged in employment by the state or local government.

### **Smallpox Vaccination**

At the first workgroup meeting, an Orange County Department of Health (Health Department) representative testified about the problems that may face first responders who take the smallpox vaccine. According to the statistics given by the Health Department in 2004, 3,942 people received the smallpox vaccination in Florida. In 2004, Florida ranked second among the nation in the total number of vaccinations given.

One problem faced by first responders vaccinated for smallpox is whether any adverse reaction they may have in response to the vaccination is compensable (i.e. in the course and scope of employment) and thus covered under workers' compensation. Representatives from the Health Department testified in 2004 that 14 of the 3,942 people vaccinated for smallpox in Florida have had adverse reactions to the vaccination. According to testimony received at the workgroup meetings, the law was not clear as

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<sup>10</sup> s. 440.093, F.S.

<sup>11</sup> Id.

to whether an adverse reaction to a smallpox vaccine is covered under workers' compensation. Section 440.09, F.S., provides that an employer must pay compensation or furnish under ch. 440, F.S., if the employee suffers an accidental compensable injury or death arising out of work performed in the scope and course of employment, but the law does not address smallpox vaccinations.

In 2003, Congress created the Smallpox Vaccine Injury Compensation Program.<sup>12</sup> This program compensates law enforcement, firefighters, emergency medical personnel, and other public safety personnel for medical benefits, death benefits, and lost wages due to an adverse reaction to a smallpox vaccination. In order to be compensated under the program, the first responder must volunteer and be selected to serve as a member of a smallpox emergency response plan prior to an outbreak of smallpox. The program also provides medical, death, and lost-wage benefits to family members or others in contact with the vaccinated first responder who sustains a medical injury from exposure to the smallpox virus through physical contact with the vaccinated first responder. Any payments under the program are secondary to payments made or due from health insurance, workers' compensation, or any other entity. The program is administered by the U.S. Department of Health and Human Services and is subject to statutory filing deadlines.

The bill clarifies any uncertainty in the workers' compensation community regarding the compensability of an adverse reaction to a small pox vaccination by a first responder. The bill provides that any adverse medical condition to a first responder caused by a smallpox vaccination is a compensable workers' compensation injury.

#### C. SECTION DIRECTORY:

**Section 1.** Creates a new subsection in s. 440.091, F.S.; defines first responders; provides for the compensability of toxic substance exposure for first responders under certain circumstances proven by a preponderance of evidence; makes any medical complication incurred by a first responder as a result of a small pox vaccinations compensable; provides for the compensability of occupational disease cases by first responders under certain circumstances proven by a preponderance of evidence; provides for the continuation, after age 62, of permanent total supplement for first responders not in employment that participates in social security program; defines occupational disease.

**Section 2.** Expresses legislative intent that the bill fulfills an important state interest.

**Section 3.** Provides that the bill takes effect on October 1, 2006.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

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<sup>12</sup> Public Law 108-20, 117 Stat. 638 a/k/a The Smallpox Emergency Personnel Protection Act of 2003

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill will impact counties and any entity that employs first responders. See the FISCAL COMMENTS section, below.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Permanent total disability supplemental benefits for first responders that were employed by a state or local government unit that did not participate in the social security program would be extended beyond age 62, regardless of whether their public employer provided an alternative retirement program. Under current law, generally permanent total disability benefits cease at age 75 and supplemental permanent total disability benefits end at age 62.

By lowering certain compensability standards for first responders for occupational diseases and toxic exposure, it is expected that first responders would likely prevail more often in those types of claims against their employers.

Any additional costs of funding workers' compensation coverage for state and local governments could be ultimately passed through to taxpayers. One method of passing the expense on to taxpayers is by raising taxes.

D. FISCAL COMMENTS:

The Department of Financial Services (DFS) indicates the legislation has no direct/fiscal impact on the Division of Workers' Compensation. The DFS indicates the bill will have little or no fiscal impact on The Risk Management Trust Fund.

The Office of Insurance Regulation (OIR) has stated that the legislation will have no regulatory or fiscal impact for the OIR.

According to the Department of Corrections, it employs 50 employees meeting the definition of first responder under the bill. All these employees are employed in the department's Inspector General's office and conduct internal investigations. The department believes the fiscal impact on it by these employees being covered under the bill is negligible.

The Department of Juvenile Justice opined it did not have any employees falling under the definition of first responder; thus the bill has no fiscal impact on this department.

NCCI estimates that costs for first responder classes would increase 3.8% (\$8.2 million) if this proposal were enacted in its current form. The increased costs result from providing permanent total supplemental benefits after age 62 for some first responders (3.6% increase). The impact of allowing workers' compensation for adverse medical reactions to small pox vaccinations and of defining "occupational disease" as the bill does is negligible.

Individual self-insureds, primarily cities and counties, do not report data to NCCI and are not included in NCCI's estimate. The Florida League of Cities provides a self-insurance fund that some cities and some smaller counties participate in for workers' compensation. Other counties, such as Dade,

Broward, Leon, and Polk, self insure, but do not participate in a self insurance fund.<sup>13</sup> Many of the sheriff's offices participate in a self insurance fund for workers' compensation.<sup>14</sup> NCCI's estimated 3.6% cost increase does not include the cost increases self insurers insuring first responders would incur. As a result, additional costs are expected from individual self-insureds that employ first responders. This includes a number of major governmental entities, including sheriff's offices, across the state.<sup>15</sup>

According to the Department of Management Services, it is possible that in-line-of-duty disability retirement experience could worsen for the "first responders" group, thereby producing actuarial losses that would slowly emerge and be identified in future valuations and experience studies. If such costs occur, they would be funded through contribution rate increases as recommended in future valuations of the Florida Retirement System.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

The mandate provision appears to apply because the bill requires counties or municipalities to expend funds; therefore, requiring a 2/3 vote of the membership of each house. The bill includes a statement of important state interest.

##### 2. Other:

None.

#### B. RULE-MAKING AUTHORITY:

None.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On April 5, 2006, the Insurance Committee heard the bill, adopted a strike-all amendment, and reported the bill favorably with a committee substitute. The strike-all amendment changed the bill as follows:

- Removed the bill's provisions relating to psychiatric benefits to first responders which, among other things, allowed first responders to receive psychiatric medical care without a physical touching and excluded first responders from the statutory limit relating to receipt of temporary indemnity and permanent impairment benefits.
- Removed the bill's provisions allowing hourly attorney's fees in some first responder cases.

The strike-all amendment maintained the following provisions in the bill:

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<sup>13</sup> Information received from a representative of the Florida Association of Counties.

<sup>14</sup> Id.

<sup>15</sup> National Council on Compensation Insurance, Inc., *ANALYSIS OF AMENDMENT TO FLORIDA HB 141 FOR FIRST RESPONDERS*, 12/5/05.

- Definition of “first responder.”
- Looser compensability standard of proof for first responders injured as a result of an occupational disease or exposure to a toxic substance.
- Definition of “occupational disease.”
- Allowance for first responders to receive payment of PTD supplemental benefits after age 62 if the first responder’s employer does not participate in Social Security.
- Allowance for first responders to receive workers’ compensation benefits for an adverse reaction to a small pox vaccine.

The amendment also moved the statutory changes from chapter 112 to chapter 440, the workers’ compensation chapter.

The staff analysis was updated to reflect the strike-all amendment.